No. 79-1214

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Iowa Beef Processors, Inc., et al.,

Petitioners,

vs.

Meat Price Investigators Ass'n, Darrell Cameron, and Don Ludvigson, et al.,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Pursuant to Rule 22.6, petitioners call the Court's attention to certain recent developments which indicate that this petition should now be granted.

This is one of three cases in which certiorari petitions were filed to determine whether a right of contribution exists among antitrust defendants. On June 16, 1980, this Court granted certiorari in *Westvaco Corp., et al. v. Adams Extract Co., et al.*, No. 79-972, to resolve the conflict among the circuits on that issue. This case and *Wilson P. Abraham Construction Co. v. Texas Industries, Inc.*, No. 79-1144, are being held pending decision of *Westvaco.*

However, it now appears that the *Westvaco* petition either has become moot or must be dismissed as improvidently granted because the sharply adversary positions which are a jurisprudential requirement for this Court's decision of such a difficult and important issue no longer exist. (See the Motion of Certain Respondents to Dismiss the Writ of Certiorari, filed September 24, 1980 in *Westvaco*.)

Given the current confusion in *Westvaco* and the possibility that the petition in that case may shortly be dismissed, petitioners suggest that certiorari should now be granted in this case to insure that the status of antitrust contribution will be resolved during this Term. This case raises the contribution question in precisely the same procedural context as *Westvaco*: non-settling defendants seeking to protect their interests when the plaintiffs enter into cheap, early settlements with certain other defendants. This is also the context in which antitrust contribution will most commonly be sought.[1]

Indeed, this case presents an even better occasion for resolving the conflict than *Westvaco*. Unlike *Westvaco*, this case clearly presents the contribution issue not only in the context of a cross-claim against a settling defendant, but also in its alternative context of a reduction in the amount of the plaintiff's claim proportionate to the settling defendant's putative liability ("claim reduction"). (See the Motion of Certain Respondents to Dismiss the Writ of Certiorari in *Westvaco*, cited above, p. 5.)

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[1] In contrast, *Wison P. Abraham* involves the more unusual procedure of an antitrust defendant bringing a third-party action against a party not sued by the plaintiffs.

Finally, unlike any of the other cases, this case raises the contribution issue in a context which most clearly demonstrates the potential abuse of a no-contribution rule: an attempt by some defendants to settle a class action *prior to Rule 23 certification* for "expense money" and to shift the entire risk of ultimate liability to the non-settling defendants. The absence of a clear rule allowing contribution or claim reduction thus enabled plaintiffs who had not yet established their right to sue as class representatives to coerce a premature settlement of class claims solely to obtain "financing" from some defendants, while preserving their entire claim (minus only the settlement amounts) against the remaining defendants.

This stratagem, feasible only if plaintiffs can offer early settlers freedom from contribution without themselves sacrificing any significant part of their claim, inevitably will encourage the filing of class actions by plaintiffs who would not be adequate class representatives under *Eisen*,[2] but for their ability to shift the financial burden to defendants even prior to class certification. This maneuver also brings into sharp focus the concern expressed by the CHIEF JUSTICE in *Deposit Guaranty National Bank v. Roper*, ... U.S. ....., 100 S.Ct. 1166, 1174 n.12 (March 19, 1980) (emphasis in original):

> Difficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification; this case does not require us to reach these questions.

The pre-certification settlement class issue, one of the thorniest in current class-action litigation and present

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[2] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

only in this case, is one which is inextricably intertwined with contribution and deserves to be resolved simultaneously.

In order to resolve the conflict in the circuits on the contribution issue and also to determine the propriety of the pre-certification settlement class device, thus removing the uncertainty plaguing much pending antitrust litigation, petitioners request that certiorari be granted immediately.

Respectfully submitted,

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